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NO. 645

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1968

JOHN DAVIS ..... Petitioner

VS.

STATE OF MISSISSIPPI ..... Respondent

BRIEF FOR RESPONDENT

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Certiorari was granted in this case limited to the first question presented by the petitioner which reads as follows

> "WHETHER THE INTRODUCTION INTO EVIDENCE AT PETITIONER'S CRIMINAL TRIAL OF HIS FINGERPRINTS, TAKEN AS A RESULT OF PETITIONER'S ILLEGAL ARREST, VIOLATED PETITIONER'S RIGHTS UNDER THE FOURTH AND FOURTEENTH AMENDMENTS?"

The issue in this case is whether or not petitioner was under arrest at the time his fingerprints were *first* taken.

The State has no argument with the contention of petitioner that *if he was, in fact, under arrest* at the time his fingerprints were first taken that, at least insofar as this record shows, probable cause for his arrest did not exist and that the fingerprints would be admis-

sible. However, in spite of the improvident use of the word "arrest" by the officers who escorted him to headquarters, the record further and clearly demonstrates that petitioner was not, in fact, under arrest in the legal sense of the word. A brutal and heinous crime was committed upon Mrs. Key on the night of December 2, 1965. She was hospitalized and in a nervous condition and undoubtedly, because of that condition, she did not immediately identify petitioner as her assailant. Picture the quandary of the Meridian Police Department in searching out leads where there were no eye-witnesses to the crime. The record shows that sixty-five or seventy young Negroes were also picked up in the course of the investigation of this crime and that fingerprints and palmprints of twenty-four of them, including petitioner, were taken and sent to the F.B.I. Laboratory along with the latent prints lifted from the window of the Key home. This fact, coupled with the fact that, after fingerprinting and palmprinting petitioner on the day after the crime and immediately letting him go his way, clearly indicates that none of those sixty-five or seventy who were interrogated or picked up were suspects but were only interrogated and printed by the police in an effort to get leads to establish probable cause to arrest the guilty party. This case is wholly unlike *Bynum v. United States*, 262 *F. 2d* 465 (*D.C. Cir.* 1958), which petitioner maintains is directly in point, for in *Bynum* the fingerprints were taken during an interrogation process at police headquarters after Bynum had been arrested and booked for the crime for which he was charged and Bynum is confined to evidence "which the public authorities have caused an arrested person to yield to them during illegal detention." Petitioner was not being illegally detained.

In *Fondren v. State*, 253 *Miss.* 241, 175 *So.* 2*d* 628 (1965), the question of the arrest of Fondren was an issue and the Supreme Court of Mississippi said that, "The mere fact that these officers talked to accused in police headquarters before he was identified and taken to jail does not establish that defendant was under arrest at the time."

The Court must bear in mind that fingerprints fall in an entirely different category from testimonial communications from a subject being interrogated and the privilege against self-incrimination under the Fifth and Fourteenth Amendments to the Constitution of the United States does not apply. This is so well established that in *Schmerber v. California,* 384 *U.S.* 757, 16 *L. Ed.* 2d 908, 86 *S. Ct.* 1826 (1966), the United States Supreme Court dismissed the matter by a mere footnote reference to where the cases on the subject are collected.

All that the Meridian Police could possibly have known about petitioner at the time he was interrogated and fingerprinted was that he had several times recently worked as a yard boy for Mrs. Key and the State agrees that that would not amount to probable cause for his arrest but it would authorize them to interrogate him to obtain leads and at the same time take his fingerprints and palmprints. The case was strictly in the investigatory stage as distinguished from the accusatory stage in *Escobedo v. Illinois,* 388 *U.S.* 478, 12 *L. Ed.* 2*d* 977, 84 *S. Ct.* 1758. Unlike *Escobedo,* this was "a general inquiry into an unsolved crime." As stated in *Culombe v. Connecticut,* 367 *U.S.* 568, 6 *L. Ed.* 2*d* 1037, 81 *S. Ct.* 1860, "often there is little else the police can do than interrogate suspects as an indispensable part of criminal investigation." Culombe's conviction was

reversed but because of circumstances entirely unlike the case at bar.

A conviction was reversed by the United States Supreme Court in *Spano v. New York*, 360 *U.S.* 315, 3 *L. Ed. 2d* 1265, 79 *S. Ct.* 1202, but the Court pointed out in a separate opinion by Justices Stewart, Douglas and Brennan that, "Let it be emphasized at the outset that this is not a case where the police were questioning a suspect in the course of investigating an unsolved crime."

The decisions of the United States Supreme Court most restrictive on the activities of the police officers in investigating crimes in recent years is that of *Miranda v. Arizona*, 384 *U.S.* 436, 16 *L. Ed. 2d* 694, 86 *S. Ct.* 1602, but even in that decision (16 L. Ed. 2d at 725) stated that:

> "Our decision is not intended to hamper the traditional functions of police officers in investigating crime. See Escobedo v. Illinois, (citation omitted). When an individual is in custody on probable cause, the police may, of course, seek out evidence in the field to be used at trial against him. Such investigation may include inquiry of persons not under restraint. General on-the-scene questioning as to facts surrounding a crime *or other general questioning of citizens in the fact-finding process is not affected by our holding.* It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement. In such situations the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present." (Emphasis added)

As pointed out in *United States v. Kelley*, 55 *F. 2d* 67, (*Court of Appeals, 2nd Cir.*, 1932) in an opinion by the eminent Judge Augustus N. Hand, "Any restraint of the person may be burdensome, but some burdens must be borne for the good of the community (citations omitted). The slight interference with the persons involved in fingerprinting seems to us one which must be borne in the common interest." And further that, "We prefer, however, to rest out decision upon the general right of the authorities charged with the enforcement of the criminal law to employ fingerprinting as an appropriate means to *identify criminals and detect crime.*" (Emphasis added).

As was said in *Grissom v. Lawler*, (*Ala.*) 65 *So.* 705, an arrest has three elements: authority, intention and restraint of the person. Regardless of the use of the word "arrest" by the officers who escorted petitioner to headquarters, it is clear from this record that there was no intention to arrest and restrain the person of petitioner and charge him with this crime. All of the actions of the police were purely investigatory. This is further indicated by the fact that they requested petitioner to suggest the names of other young Negro males that they might interrogate. Cf. also *Hutcherson v. United States*, 351 *F. 2d* 748, 750, 122 *U.S. App. D. C.* 51, wherein a policeman had been escorted to police headquarters by another officer for the purpose of questioning him regarding alleged conduct which subsequently led to an indictment charging bribery and in which said that this amounted only to an investigatory session and that the conduct of the policeman's superiors in thus pursuing inquiries fell short of an "arrest."

An interesting case on the fingerprinting of a person not suspected of any crime is *Martin v. Santora*, 199 *So.*

2d 63 (*Miss.* 1967). This was a civil suit for false imprisonment by an employee of a store because she was taken to police headquarters and fingerprinted because she had handled some merchandise boxes after a burglary of the store had been discovered and the police and the store manager needed her prints to eliminate hers from any other prints that may have been found on those boxes. She resisted but the police and the manager insisted and she was taken to headquarters and fingerprinted. This Court reversed an award of damages for false imprisonment and stated that:

> "The more visiting of a police station with officers to make a statement (Limbeck v. Gerry, 15 Misc. 663, 39 N.Y.S. 95 [1896]) or have fingerprints made so the officers may eliminate the fingerprints on an article of those persons who had the right to handle the articles is not false imprisonment. This is true because there was no unlawful detention of the person of the plaintiff. Powell v. Moore, 252 Miss. 471, 174 So. 2d 352, (1965)."

Therefore, since the restraint of appellant was not illegal but merely a momentary detaining for interrogation in an effort to get a lead on a serious unsolved crime did not amount to an arrest and, since the fingerprinting and palm-printing is not protected by the constitutional provisions against self-incrimination, this petition should be denied.

Appellant's Brief speaks of the multiple arrests of appellant. The only so-called arrest or detention of appellant of any relevancy in this case is the first time the police talked to him and took his prints. As demonstrated hereinabove the constitutional privilege of self-incrimination does not extend to prints. *Schmerber v. California*, supra.

The record does show that the appellant was subsequently picked up on occasions and was taken to the Highway Patrol Headquarters in Jackson, submitted to a polygraph test and gave "a statement". The nature of this statement is not revealed. Be that as it may, nothing, absolutely nothing, that might have been learned as a result of these activities of the police was used against appellant at the trial.

> "Pretrial interrogation of a criminal suspect by police, without warning him of his constitutional right to remain silent, and without granting his request for counsel does not constitute prejudicial error, in the absence of proof that a confession, admission, or statement obtained from the defendant as a result of such interrogation was used in the evidence at the trial." *State v. Silvacarvalho* (*Neb.* 1966), 145 *N.W.* 2*d* 447, 449, followed in *State v. Levell,* (*Neb.* 1967), 149 *N.W.* 2*d* 46; *State v. Hizel* (*Neb.* 1967); 150, *N.W.* 2*d* 217. See also to the same effect: *Knowles v. State* (*Ala.* 1967), 194 *So.* 2*d* 562, 564; *People v. Succop,* (*Calif.* 1967), 57 *Cal. Rptr.* 269; *State v. Corrigan* (*Conn.* 1967), 228 *Atl.* 2*d* 568; *State v. Heller* (*Conn.* 1966), 228 *Atl.* 2*d* 815, 821; *State v. Wessling* (*Iowa* 1967), 150 *N.W.* 2*d* 301; *Cox v. Commonwealth* (*Ky.* 1967), 411 *S.W.* 2*d* 320; *Ross v. Warden* (*Md.* 1967) 227 *Atl.* 2*d* 42, 45.

Petitioner would make capital of the fact that the fingerprints and palmprints that were sent to the F.B.I. were on a fingerprint card which was made after petitioner was in fact arrested and that those prints were taken after an unlawful arrest and after appellant had made some sort of incriminating statement, the nature of which does not appear of record. Since petitioner's prints were taken twice, lawfully the first time for the

reasons hereinabove stated, assuming only for purposes of argument that the second time his prints were unlawfully obtained as a result of an unlawful arrest and interrogation, it does without saying that both fingerprint cards were identical, both having been the prints of petitioner, it should make no difference in the practical or legal sense which card was sent to the F. B. I. for comparison. It would be a useless gesture to vacate this conviction since on a new trial the fingerprint card first made of petitioner's prints would be admissible in evidence and the same result would, without question, be had in a second trial. This is certainly a case for the application of the harmless error rule of *Chapman v. California*, 386 *U.S.* 18, *reh. den.*, 386 *U.S.* 987 (1967).

Wherefore, it is respectfully submitted that the judgment of conviction should stand.

Respectfully submitted,

JOE T. PATTERSON, Attorney General

BY

G. Garland Lyell, Jr.
Assistant Attorney General

CERTIFICATE

I, G. Garland Lyell, Jr., Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a copy of the foregoing Brief for Respondent, State of Mississippi, to Honorable Melvyn Zarr, Attorney at Law, 10 Columbus Circle, New York, New York 10019, and to Jack Young, Attorney at Law, 115½ North Farish Street, Jackson, Mississippi 39201.

This the 31st day of January, A. D., 1968.

G. Garland Lyell, Jr.
Assistant Attorney General